

42. Defendant continues to take access services from Plaintiffs, while withholding payment for the services they provide.

FACTS SPECIFIC TO EACH PLAINTIFF

Access Charges Unlawfully Withheld from All American

43. All American filed its federal tariff with the FCC on or about June 28, 2005, and it became effective on or about July 1, 2005 pursuant to the FCC's rule regarding streamlined tariff filings, 47 C.F.R. § 61.23(c).

44. All American has been providing interstate access service to AT&T since February of 2006, and has billed AT&T for these access charges, as prescribed in All American's interstate access tariff filed with the FCC.

45. Prior to May 1, 2006, AT&T paid these bills at All American's tariffed rate.

46. Beginning on or about May 1, 2006, AT&T ceased paying for the access services it took from All American. At the time it ceased payment AT&T offered no explanation for its actions, and did not follow the dispute resolution provisions of All American's FCC tariff.

47. By letters dated October 2, 2006 and November 10, 2006, All American formally demanded payment of the amounts withheld by AT&T.

48. By failing to pay the full amount invoiced in All American's bills, AT&T is in breach of its obligations under All American's FCC tariff.

49. Because of AT&T's refusal to pay its bills, All American has thus far been damaged in the amount of approximately \$2,025,470.80, inclusive of late fees. Additional damages are accruing daily as AT&T continues to withhold amounts due for interstate access services rendered by All American.

Access Charges Unlawfully Withheld from Chase Com

50. Chase Com filed its federal tariff with the FCC on or about October 12, 2005, and it became effective on or about October 13, 2005 pursuant to the FCC's rule regarding streamlined tariff filings, 47 C.F.R. § 61.23(c).

51. Chase Com has been providing interstate access service to AT&T since February of 2006, and has billed AT&T for these access charges, as prescribed in Chase Com's interstate access tariff filed with the FCC.

52. AT&T has never paid for the access services it took from Chase Com, has offered no explanation for its actions, and did not follow the dispute resolution provisions of Chase Com's FCC tariff.

53. By letters dated October 2, 2006 and November 10, 2006, Chase Com formally demanded payment of the amounts withheld by AT&T.

54. By failing to pay the full amount invoiced in Chase Com's bills, AT&T is in breach of its obligations under Chase Com's FCC tariff.

55. Because of AT&T's refusal to pay its bills, Chase Com has thus far been damaged in the amount of approximately \$57,189.85, inclusive of late fees. Additional damages are accruing daily as AT&T continues to withhold amounts due for interstate access services rendered by Chase Com.

Access Charges Unlawfully Withheld from e-Pinnacle

56. e-Pinnacle filed its federal tariff with the FCC on or about October 12, 2005, and it became effective on or about October 13, 2005 pursuant to the FCC's rule regarding streamlined tariff filings, 47 C.F.R. § 61.23(c).

57. e-Pinnacle has been providing interstate access service to AT&T since February of 2006, and has billed AT&T for these access charges, as prescribed in e-Pinnacle's interstate access tariff filed with the FCC.

58. Prior to May 1, 2006, AT&T paid these bills at e-Pinnacle's tariffed rate.

59. Beginning on or about May 1, 2006, AT&T ceased paying for the access services it took from e-Pinnacle. At the time it ceased payment AT&T offered no explanation for its actions, and did not follow the dispute resolution provisions of e-Pinnacle's FCC tariff.

60. By letters dated October 2, 2006 and November 10, 2006, e-Pinnacle formally demanded payment of the amounts withheld by AT&T.

61. By failing to pay the full amount invoiced in e-Pinnacle's bills, AT&T is in breach of its obligations under e-Pinnacle's FCC tariff.

62. Because of AT&T's refusal to pay its bills, e-Pinnacle has thus far been damaged in the amount of approximately \$193,009.86, inclusive of late fees. Additional damages are accruing daily as AT&T continues to withhold amounts due for interstate access services rendered by e-Pinnacle.

Access Charges Unlawfully Withheld from Great Lakes

63. Great Lakes filed its federal tariff with the FCC on or about August 31, 2005 and it became effective on or about September 2, 2005 pursuant to the FCC's rule regarding streamlined tariff filings, 47 C.F.R. § 61.23(c).

64. Great Lakes has a certificate of public interest and necessity granted by the IUB, and operates as a competitive local exchange carrier within Iowa.

65. As permitted by the rules of the IUB, Great Lakes did not file a separate intrastate access tariff, but instead filed notice that Great Lakes concurs in the tariff maintained by the Iowa Telecommunications Association.

66. Great Lakes has provided intrastate exchange access and other services to Defendant under a lawful state tariff. Its tariffed intrastate access rates are fully compliant with the Iowa Utilities Board's regulations governing CLEC access charges.

67. Great Lakes has been providing interstate access service to AT&T since August of 2005, and has billed AT&T for intrastate and interstate access charges, as prescribed in Great Lakes's interstate access tariff filed with the FCC and its Iowa state tariff.

68. Prior to October 1, 2006, AT&T paid these bills at Great Lakes's tariffed rate.

69. Beginning on or about October 1, 2006, AT&T ceased paying for the access services it took from Great Lakes. At the time it ceased payment AT&T offered no explanation for its actions, and did not follow the dispute resolution provisions of Great Lakes's FCC tariff or Iowa access tariff.

70. By letters dated October 2, 2006 and November 10, 2006, Great Lakes formally demanded payment of the amounts withheld by AT&T.

71. By failing to pay the full amount invoiced in Great Lakes's bills, AT&T is in breach of its obligations under Great Lakes's FCC tariff and Iowa access tariff.

72. Because of AT&T's refusal to pay its bills, Great Lakes has thus far been damaged in the amount of approximately \$1,652,669.80, inclusive of late fees. This amount includes intrastate access charges of \$89,305.31, inclusive of late fees. Additional damages are

accruing daily as AT&T continues to withhold amounts due for interstate and intrastate access services rendered by Great Lakes.

COUNT I
(Collection Action Pursuant To Federal Tariff)

73. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 to 72 of this Complaint as if fully set forth herein.

74. Plaintiffs have provided interstate switched access services to Defendant. Defendant is required to pay Plaintiffs' access charges as set forth in their federal tariffs.

75. AT&T has failed to pay the access charges that Defendant owes under the tariffs, and the associated late fees.

76. Plaintiffs have and continue to be damaged, directly and consequentially, by Defendant's refusal to pay the access charges it owes, plus late fees as called for in the tariffs. Plaintiffs are entitled to recover these amounts, or such other damages as may be established at trial.

COUNT II
(Violation of Section 201 of the Communications Act, 47 U.S.C. § 201)

77. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 to 76 of this Complaint as if fully set forth herein.

78. Defendant is required to pay Plaintiffs' switched access charges as set forth in their federal tariffs.

79. AT&T has failed to pay the access charges Defendant owes under the tariffs, and the associated late fees.

80. Section 201(b) of the Communications Act, 47 U.S.C. § 201 imposes upon common carriers the duty that their practices in connection with communication services be "just and reasonable," and provides that all unjust and unreasonable practices are unlawful.

81. Defendant has engaged in unreasonable, unjustified, and unlawful self-help by refusing to pay to Plaintiffs the access charges that AT&T lawfully owes.

82. Defendant's refusal to pay the lawful access charges associated with services it has taken, and continues to take, from Plaintiffs constitutes an unreasonable practice in violation of Section 201(b) of the Act and the FCC's implementing decisions.

83. As a result of Defendant's unreasonable practice of refusing to pay for lawfully-tariffed services, Plaintiffs have been damaged in the amount previously set forth or such other damages as may be established at trial.

84. Because Defendant's conduct is willful and malicious and includes, *inter alia*, an intentional refusal to abide by filed tariffs, disregard of controlling orders of the FCC and illegal self-help, Plaintiffs are entitled to an award of punitive damages.

85. Because Defendant's conduct constitutes a violation of Section 201(b) of the Act, Plaintiffs are entitled to recover their reasonable attorneys' fees pursuant to Section 206 of the Act, 47 U.S.C. § 206.

COUNT III

(Violation of Section 203 of the Communications Act, 47 U.S.C. § 203)

86. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 to 85 of this Complaint as fully set forth herein.

87. Defendant is required to pay Plaintiffs' switched access charges as set forth in their federal tariffs.

88. AT&T has failed to pay the access charges Defendant owes under the tariffs, and the associated late fees.

89. Section 203 of the Communications Act, 47 U.S.C. § 203, imposes upon common carriers the duty to file tariffed rates for regulated communications services, and to pay the tariffed rates for such services. Section 203(c) states that no carrier shall "charge, demand, collect, or receive a greater or less compensation, for such communication [than the tariffed rate]."

90. Defendant has engaged in an unreasonable practice of refusing to pay Plaintiffs their tariffed rates for the access services it has utilized, thereby "demanding" and "receiving" a rate less than the tariffed rate, in violation of Section 203(c) of the Act and the FCC's implementing decisions. *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company*, 62 F.C.C.2d 703 (1976).

91. As a result of Defendant's unreasonable practice of refusing to pay for lawfully-tariffed services, Plaintiffs have been damaged in the amounts set forth above or such other damages as may be proved at trial.

92. Because Defendant's conduct is willful and malicious and includes, *inter alia*, an intentional refusal to abide by filed tariffs, disregard of controlling orders of the FCC and illegal self-help, Plaintiffs are entitled to an award of punitive damages.

93. Because Defendant's conduct constitutes a violation of Section 203(c) of the Act, Plaintiffs are entitled to recover their reasonable attorneys' fees, pursuant to Section 206 of the Act, 47 U.S.C. § 206.

COUNT IV
(Collection Action Pursuant to State Tariff)

94. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 to 93 of this Complaint as if fully set forth herein.

95. Plaintiff Great Lakes has provided intrastate switched access services to Defendant. Defendant is required to pay Plaintiff's access charges as set forth in its state tariff.

96. AT&T has failed to pay the access charges that it owes under Plaintiff's tariff, and the associated late fees.

97. Plaintiff has and continues to be damaged, directly and consequentially, by Defendant's refusal to pay the access charges it owes, plus late fees as called for in the tariff. Plaintiff is entitled to recover these amounts, or such other damages as may be established at trial.

COUNT V
(Violation of Section 476.5 of the Iowa Code)

98. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 to 97 of this Complaint as if fully set forth herein.

99. Defendant is required to pay Plaintiff Great Lakes's switched access charges as set forth in its state tariff.

100. AT&T has failed to pay the access charges it owes under Plaintiff's tariff, and the associated late fees.

101. Section 476.5 of the Iowa Code prohibits any public utility from "directly or indirectly charg[ing] a greater or less compensation for its services than that prescribed in its tariffs, and no such public utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person"

102. Defendant has engaged in an unreasonable practice of refusing to pay Great Lakes its tariffed rates for the access services it has utilized, thereby obtaining a lesser rate

"than that prescribed in [the utility's] tariff." In so doing, it violates the prohibition of Section 476.5.

COUNT VI
(Quantum Meruit)

103. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 to 102 of this Complaint as if fully set forth herein.

104. Plaintiffs have provided, and continue to provide, valuable switched access services to Defendant.

105. Defendant accepted, used and enjoyed the access services that Plaintiffs have provided, and continue to provide, to Defendant.

106. It was at all times foreseeable that Plaintiffs expected to be paid for the access services they provided to Defendant.

107. The reasonable and fair market value of the services for which AT&T has refused to pay is established by Plaintiff's tariffed switched access charge rates. AT&T would be unjustly enriched were it permitted to use Plaintiffs' access services without paying the reasonable value thereof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) enter judgment against Defendant for all direct and consequential damages incurred by Plaintiffs, in an amount to be determined at trial, but no less than the access charges that Defendant owes Plaintiffs, together with associated tariffed late fees and prejudgment interest;

(2) award Plaintiffs reasonable attorneys' fees and the costs of this action, pursuant to 47 U.S.C. § 206;

(3) award Plaintiffs punitive damages as a result of Defendant's willful, wanton, malicious and reckless behavior;

(4) issue a preliminary and permanent injunction barring Defendant from continuing to engage in the conduct alleged herein and directing Defendant to pay access charges in the future if Defendant continues to use Plaintiffs' services; and

(6) grant such other relief as this Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: New York, New York
March 6, 2007

Respectfully submitted,

KELLEY DRYE & WARREN LLP

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ATTACHMENT 2

**[SDNY Judge Pauley's Order Regarding Referral of
AT&T's "Sham Entity" Claim to the Commission]**

Only the Westlaw citation is currently available.

United States District Court,
 S.D. New York.
 ALL AMERICAN TELEPHONE COMPANY, INC.
 et al., Plaintiffs,
 v.
 AT & T, INC., Defendant.
 No. 07 Civ. 861(WHP).

March 16, 2009.

Ross A. Buntrock, Esq., Jonathan E. Canis, Esq.,
 Womble, Carlyle, Sandridge & Rice, PLLC, Wash-
 ington, DC, for Plaintiffs.

Steven M. Bierman, Esq., Sidley Austin LLP, New
 York, NY, James F. Bendernagel, Jr., Esq., Sidley
 Austin LLP, Washington, D.C. for Defendant.

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge.

*1 Plaintiffs All American Telephone Company, Inc., Chase Com, and e-Pinnacle Communications, Inc. (collectively, the "CLECs" ^{FN1}), bring claims under the Federal Communications Act of 1934, 47 U.S.C. § 151 et seq. (the "FCA"), and for quantum meruit to recover fees for services provided to Defendant AT & T, Inc. ("AT & T"). AT & T counterclaims for unreasonable practices under 47 U.S.C. § 203, violations of the federal tariffs and unreasonable practices under 47 U.S.C. § 201, as well as various state law claims. By a Memorandum and Order dated July 24, 2008 (the "July 2008 Memorandum and Order"), this Court granted the CLECs' motion for judgment on the pleadings as to "all claims and counterclaims." *All Am. Tel. Co., Inc. v. AT & T, Inc.*, No. 07 Civ. 861(WHP), 2008 WL 2876424 (S.D.N.Y. July 24, 2008).

^{FN1}. A CLEC, or competitive local exchange carrier, provides inter-and intra-state exchange access service, as well as local long distance and enhanced service to business and residential customers. (First Am.

Compl. dated Mar. 6, 2007 ("Compl.") ¶ 6.)

AT & T moves for reconsideration pursuant to Local Civil Rule 6.3. In responding to the motion, the CLECs seek attorneys' fees and also move to strike AT & T's Amended Counterclaims. For the following reasons, AT & T's motion for reconsideration is granted, and upon reconsideration, the July 2008 Memorandum and Order is vacated. The CLECs' motions are denied.

BACKGROUND

The CLECs are competitive local exchange carriers operating in Utah and other rural areas in the United States. (First Am. Compl. dated Mar. 6, 2007 ("Compl.") ¶¶ 6-8.) AT & T provides long distance calling services. (Counterclaims of AT & T dated Mar. 26, 2007 ("Counterclaims") ¶ 4.) AT & T contracts with the CLECs to carry calls originating or terminating in the rural areas they cover, where AT & T does not have local exchange facilities. (Counterclaims ¶ 12.)

All telecommunications carriers must file tariffs which, upon approval by the Federal Communications Commission ("FCC"), govern their rate structure. 47 U.S.C. § 203. The operative tariffs here cover "Switched Access Service" which "provides for the use of common switching, terminating, and trunking facilities between a Customer Designated Premises and an end user's premises for originating and terminating traffic." (All American Telephone Co., Inc. Access Service Tariff F.C.C. No. 1, issued June 29, 2005 ("All American Access Tariff") at 69; Chase Com Access Service Tariff F.C.C. No. 1, issued Oct. 12, 2005 ("Chase Com Access Tariff") at 70; e-Pinnacle Communications, Inc. Access Service Tariff F.C.C. No. 1, issued Oct. 12, 2005 ("e-Pinnacle Access Tariff") at 71 (collectively, the "Access Tariffs").) The Access Tariffs define "end users" as "[u]sers of local telecommunications carrier's services who are not carriers." (All American Access Tariff at 69; Chase Com Access Tariff at 70; e-Pinnacle Access Tariff at 71.) AT & T denies that the CLECs provided access services as defined by the tariffs for the traffic delivered to the CLECs. (See Answer dated Mar. 26, 2007 ("Answer") ¶¶ 41, 42,

44, 45, 51, 57, 67, 74; Counterclaims dated Mar. 26, 2007 ("Counterclaims") ¶¶ 16, 32, 40.)

*2 The Counterclaims allege that the CLECs have entered into agreements with various internet companies (the "Free Calling Parties") to offer free conference calling, pornographic chat line services, and other services. (Counterclaims ¶ 27.) Through Internet advertisements, the Free Calling Parties generate heavy traffic to the CLECs. (Counterclaims ¶ 42.) The Free Calling Parties direct customers from around the country to certain telephone numbers within the CLECs' local exchange networks, and the CLECs "use simple telecommunications equipment to create a conferencing or chat line bridge." (Counterclaims ¶ 27.) The CLECs then bill AT & T for access services for these calls. (Counterclaims ¶ 28.) AT & T claims that the CLECs do not offer services to any actual customers and that one of the CLECs, Chase Com, has no customers besides itself. (Counterclaims ¶ 16.) AT & T also contends that the CLECs are just "sham" entities created to bill massive amounts of access charges. (Counterclaims ¶ 42.) AT & T also claims that the bills they received from the CLECs did not comply with the requirements under the tariffs. (Counterclaims ¶¶ 34, 41.)

DISCUSSION

I. Legal Standard

A motion for reconsideration under Local Civil Rule 6.3 "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir.1995). Such a motion "cannot assert new arguments or claims which were not before the court on the original motion." Koehler v. Bank of Berm. Ltd., No. M18-302 (CSH), 2005 WL 1119371, at *1 (S.D.N.Y. May 10, 2005). Reconsideration is not an invitation for parties to "treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's rulings." De Los Santos v. Fingerson, No. 97 Civ. 3972(MBM), 1998 WL 788781, at *1 (S.D.N.Y. Nov. 12, 1998). The standard for granting a motion for reconsideration is strict and the decision on such a motion is "within the

sound discretion of the district court." McNeil-PPC v. Perrigo Co., No. 05 Civ. 1321(WHP), 2007 WL 104513, at *1 (S.D.N.Y. Jan. 17, 2007) (quoting Colodnev v. Continuum Health Partners, Inc., No. 03 Civ. 7276(DLC), 2004 WL 1857568, at *1 (S.D.N.Y. Aug. 18, 2004)).

II. The CLECs' Claims

This Court's earlier judgment on the pleadings rested on the filed rate doctrine. This Court's conclusion that AT & T admitted facts sufficient to establish that it received services covered under the CLECs' filed tariffs was central to the July 2008 Memorandum and Order. However, AT & T's Answer and Counterclaims specifically denies that AT & T received services covered under the CLECs' filed tariffs. As a result, those denials prevent this Court from finding on the pleadings that the "chat lines" and Free Calling Parties are "end users" and that the services provided were access services under the tariffs. (See Answer ¶¶ 41, 42, 44, 45, 51, 57, 67, 74; Counterclaims ¶¶ 16, 32, 40.)

*3 Because the filed rate doctrine merely restricts AT & T's ability to challenge the validity of the tariff, the CLECs still have the burden of proving that the services were provided and meet the requirements of the applicable tariffs. See Advantel LLC v. AT & T Corp., 118 F.Supp.2d 680, 683 (E.D.Va.2000). These questions cannot be resolved on the pleadings and require a more developed record. Discovery in this action can focus on whether services were provided, and if so to whom. Thus, the dispute is narrow, namely, whether the services fit the specific terms of the tariffs. See Advantel LLC v. AT & T Corp., 105 F.Supp.2d 507, 511 (E.D.Va.2001) ("Because a tariff is essentially an offer to contract, ... an action [to collect charges] is essentially one for the enforcement of a contract.").

Since AT & T has not admitted that valid access services were provided under the tariffs, the CLECs have the burden to show that they did provide them. Therefore, this Court also vacates its judgment on the pleadings with respect to the CLECs' unlawful "self help" claims (Claims II and III) under 47 U.S.C. §§ 201, 203, arising from AT & T's withholding of access fee payments.

III. AT & T's Counterclaims

While the July 2008 Memorandum and Order concluded that the filed rate doctrine barred all of AT & T's counterclaims, AT & T now provides this Court persuasive authorities holding that it is proper to raise claims of unreasonable conduct under the governing federal regulatory statutes as counterclaims in actions such as this one. See Reiter v. Cooper, 507 U.S. 258 (1993) (counterclaims relating to unreasonableness of the conduct are not barred by the filed rate doctrine); see also 47 U.S.C. § 207 (allowing actions raising FCA claims in either district court or the FCC). Remarkably, the parties did not draw this Court's attention to Reiter on the underlying motion, and other authorities were buried in a footnote. See Total Telecomm. Servs., Inc. v. AT & T Corp., 16 FCC Rcd. 5726, ¶¶ 36-40 (2001), *aff'd in relevant part sub nom.*, AT & T Corp. v. FCC, 317 F.3d 227 (D.C.Cir.2003) (allowing sham entity claims under § 201 of the FCA); AT & T Corp. v. Beehive Tel. Co., 17 FCC Rcd. 11641 (2002) (allowing claims under §§ 201 and 203 of the FCA for billing in a manner inconsistent with the filed tariff). Accordingly, AT & T's Counterclaims I and II under the FCA are reinstated. It also seems prudent to reinstate AT & T's state law and declaratory judgment counterclaims, while reserving question of whether either are preempted by the FCA or barred by the filed rate doctrine. Therefore, AT & T's Counterclaims IV, V, VI, and VII are also reinstated.

IV. The Primary Jurisdiction Doctrine

The doctrine of primary jurisdiction "allows a federal court to refer a matter extending beyond the 'conventional experiences of judges' or 'falling within the realm of administrative discretion' to an administrative agency with more specialized experience, expertise, and insight." Nat'l Commc'ns Assoc. v. Am. Tel. & Tel. Co., 46 F.3d 220, 222 (2d Cir.1995) (quoting Far East Conf. v. United States, 342 U.S. 570, 574 (1952)); see also United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956). This Court must consider the doctrine of primary jurisdiction, even if it is not raised by the parties. See Advantel, 105 F.Supp.2d at 510-11. When deciding whether to refer a matter to the FCC under the doctrine of primary jurisdiction, courts consider: "(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of ex-

pertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made." Nat'l Commc'ns Assoc., 46 F.3d at 222. The "[s]tatutory reasonableness of a tariff should, of course, be reviewed by an agency because it is an 'abstract quality represented by an area rather than a pinpoint.'" Nat'l Commc'ns Ass'n, 46 F.3d at 223 (quoting Danna v. Air France, 463 F.2d 407, 410 (2d Cir.1972)).

*4 A determination of the appropriate tariff rate in the absence of a sham entity involves policy and technical decisions within the FCC's field of expertise. See MCI Telecomm. Corp. v. Dominican Commc'n Corp., 984 F.Supp. 185, 189-90 (S.D.N.Y.1997) (noting reasonable tariff determinations are best made by the FCC); see also MCI Telecomm. Corp. v. Ameri-Tel, Inc., 852 F.Supp. 659, 665 (N.D.Ill.1994) (referring claim raising the reasonableness of tariff to FCC); see also Total, 16 FCC Rcd 5726 ¶ 39 (determining that the proper remedy for sham entity violation was the reasonable tariff that would be charged in the absence of the sham entity). In addition, were this Court to determine the appropriate rate for AT & T, that decision might discriminate against other customers of the CLECs. The FCC is in the best position to determine the appropriate rate for all customers using identical services. See MCI, 984 F.Supp. at 190 (noting that non-discrimination is one of the key components of the federal regulatory scheme). Thus, at least the first three factors weigh in favor of referring this claim to the FCC. Because the remainder of this action can proceed without AT & T's sham entity claim, that claim is stayed pending the outcome of the administrative determination under the doctrine of primary jurisdiction.^{FN2} AT & T shall advise this Court within ten days whether it will pursue its sham entity claim with the FCC. This Court will dismiss the sham entity claim for failure to prosecute if AT & T does not file a complaint with the FCC within thirty days of this Order.

FN2. AT & T's claims related to unfair billing practices and billing for services not provided involve only interpreting the tariffs at issue and are well within this Court's competence. See Nat'l Commc'ns Ass'n, 46 F.3d at 223 (noting that consideration of nar-

row factual issues and interpretation of the tariff "does not require the FCC's policy expertise, or its specialized knowledge").

V. CLECs' Motion to Strike AT & T's Counterclaims

For a motion to strike under Fed.R.Civ.P. 12(f), the "appropriate inquiry is not whether a [claimant] is likely to prevail, but whether he is entitled to offer evidence to support his claims." Kassner v. Second Ave. Deli., 496 F.3d 229, 237 (2d Cir.2007).

Because this Court has granted AT & T's motion for reconsideration and reinstated its original counterclaims, the CLECs cannot carry their burden under Rule 12(f). Moreover, this Court never set a deadline for amending pleadings, and the Court granted AT & T leave to amend its counterclaims. Accordingly, the CLECs' motion to strike AT & T's Amended Answer and Counterclaims and for an award of attorneys' fees is denied. The CLECs are directed to file a reply to AT & T's Amended Counterclaims by March 30, 2009.

CONCLUSION

For the foregoing reasons, AT & T's motion for reconsideration of this Court's July 2008 Memorandum and Order (Docket No. 45) is granted, and upon reconsideration the CLECs' motion for judgment on the pleadings is denied and the July 24, 2008 Memorandum and Order is vacated. The CLECs' motion to strike AT & T's amended counterclaims and their motion for attorneys' fees incurred opposing the motion for reconsideration (Docket No. 59) are denied. Finally, AT & T's sham entity counterclaim is stayed and AT & T is directed to notify the Court whether it intends to commence a proceeding on that counterclaim before the Federal Communications Commission. This Court will hold a conference on April 3, 2009, at 12:00 p.m.

*5 SO ORDERED.

S.D.N.Y., 2009.
All American Telephone Co., Inc. v. AT&T, Inc.
Slip Copy, 2009 WL 691325 (S.D.N.Y.)

END OF DOCUMENT

ATTACHMENT 3

[AT&T March 25, 2009 Letter to the SDNY Court]



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FOUNDED 1888

March 25, 2008

BY HAND DELIVERY

Hon. William H. Pauley III
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street Room 2210
New York, NY 10007

Re: *All Am. Tel. Co., Inc. et al. v. AT&T Corp.*, No. 07-cv-861
Response of AT&T Regarding Referral Of Claim To The FCC

Dear Judge Pauley:

On behalf of defendant AT&T Corp., I write to advise the Court, as required by the Court's Order dated March 16, 2009, that AT&T intends to pursue its sham entity claim at the Federal Communications Commission ("FCC") pursuant to the Court's referral of that claim under the primary jurisdiction doctrine.

The FCC has established procedures that apply when a party seeks to raise a dispute with the FCC pursuant to a primary jurisdiction referral. *See* Public Notice, *Primary Jurisdiction Referrals Involving Common Carriers*, 15 FCC Rcd. 22449 (2000). The FCC's guidance encourages parties to contact the FCC's Staff before making a filing with the FCC to discuss the most appropriate way to raise the referred claim with the FCC. *See id.* Such claims can be properly raised with the FCC as an informal complaint, *see* 47 C.F.R. §§ 1.711-1.718, as a formal complaint, *see id.* §§ 1.720-1.735, or as a request for a declaratory ruling, *see id.* § 1.2.

AT&T is in the process of obtaining the FCC's guidance and determining the most appropriate procedure for raising its dispute at the FCC, and, as required by the Court's Order, will make its filing at the FCC by April 15, 2009.

Respectfully submitted,

Eamon P. Joyce

cc: Jonathan Canis, Esq.

ATTACHMENT 4

**[AT&T Answer to the SDNY
Collection Action Complaint]**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
	:
ALL AMERICAN TELEPHONE COMPANY,	:
INC., et al.	:
	:
<i>Plaintiffs,</i>	:
	:
v.	:
	:
AT&T CORP.,	:
	:
<i>Defendant.</i>	:
-----X	

ANSWER AND AMENDED COUNTERCLAIMS
OF DEFENDANT AT&T CORP.
TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant AT&T Corp. ("AT&T") by its undersigned counsel, Sidley Austin LLP, as for its answer and defenses to Plaintiffs' First Amended Complaint ("Complaint"), dated March 7, 2007, states as follows:

AT&T denies Plaintiffs' prayer for relief, as well as any matters contained in the headings or any text that is not contained in a numbered paragraph, none of which constitute a proper allegation.

1. AT&T denies the allegations of paragraph 1 of the Complaint.
2. To the extent the allegations in paragraph 2 of the Complaint purport to characterize rules, regulations, and orders of the Federal Communications Commission ("FCC"), federal and state statutes, regulatory requirements of the Iowa Utilities Board ("IUB"), and the "filed rate doctrine," AT&T respectfully refers the Court to such rules, regulations and orders of the FCC, federal and state statutes, regulatory requirements of the IUB, and the "filed rate doctrine" for an accurate and complete statement of their contents, and AT&T denies all

inconsistent allegations. To the extent the allegations in paragraph 2 of the Complaint state conclusions of law, AT&T denies the allegations and further responds that all conclusions of law are for the Court to reach. AT&T denies all remaining allegations in paragraph 2 of the Complaint.

3. AT&T admits that the Court has subject matter jurisdiction over this action. AT&T further states that Plaintiffs' claims constitute compulsory counterclaims that should properly be heard in *AT&T Corp. v. Superior Tel. Cooperative et al.*, No. 4:07-cv-43-JEG-CFB (filed S.D. Iowa Jan. 29, 2007) (hereinafter, the "Iowa Action") (attached as Exhibit A). AT&T denies all remaining allegations in paragraph 3 of the Complaint.

4. To the extent the allegations in paragraph 4 of the Complaint purport to characterize rules, regulations, orders, and decisions of the FCC, AT&T respectfully refers the Court to such rules, regulations and orders of the FCC for an accurate and complete statement of their content, and AT&T denies all inconsistent allegations. To the extent the allegations in paragraph 4 of the Complaint state conclusions of law, AT&T denies the allegations and further responds that all conclusions of law are for the Court to reach. AT&T denies all remaining allegations in paragraph 4 of the Complaint.

5. AT&T admits that it may be found in the Southern District of New York and asserts that Plaintiffs' claims constitute compulsory counterclaims that should properly be heard in the Iowa Action. AT&T denies all remaining allegations in paragraph 5 of the Complaint.

6. Upon information and belief, AT&T admits that All American Telephone Company, Inc. ("All American") is a Nevada corporation with its principal place of business in Las Vegas, Nevada and that All American is a CLEC. AT&T lacks knowledge and information

sufficient to form a belief as to the remainder of paragraph 6 of the Complaint. and therefore AT&T denies all remaining allegations in paragraph 6 of the Complaint.

7. Upon information and belief, AT&T admits that Chase Com ("Chase Com") is a California corporation with its principal place of business in Santa Barbara, California and that Chase Com is a CLEC. AT&T lacks knowledge and information sufficient to form a belief as to the remainder of paragraph 7 of the Complaint, and therefore AT&T denies all remaining allegations in paragraph 7 of the Complaint.

8. Upon information and belief, AT&T admits that e-Pinnacle Communications, Inc. ("e-Pinnacle") is a Utah corporation with its principal place of business in Provo, Utah and that e-Pinnacle is a CLEC. AT&T lacks knowledge and information sufficient to form a belief as to the remainder of paragraph 8 of the Complaint, and therefore AT&T denies all remaining allegations in paragraph 8 of the Complaint.

9. Upon information and belief, AT&T admits that Great Lakes Communication Corp. ("Great Lakes") is an Iowa corporation with its principal place of business in Spencer, Iowa and that Great Lakes is a CLEC. AT&T lacks knowledge and information sufficient to form a belief as to the remainder of paragraph 9 of the Complaint, and therefore AT&T denies all remaining allegations in paragraph 9 of the Complaint.

10. AT&T admits that AT&T Corp. is a New York corporation with its principal place of business in Bedminster, New Jersey. AT&T admits that it provides services in this judicial district. AT&T admits that it has common carrier lines that run through this judicial district. AT&T admits that it is an interexchange carrier ("IXC"). AT&T admits that it is a common carrier with respect to the provision of certain, but not all, services. To the extent the allegations in paragraph 10 of the Complaint state conclusions of law, AT&T denies the

allegations and further responds that all conclusions of law are for the Court to reach. AT&T denies all remaining allegations in paragraph 10 of the Complaint.

11. AT&T lacks knowledge and information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the Complaint that Plaintiffs are telecommunications common carriers and that Plaintiffs' service offerings are subject to the jurisdiction of the FCC. AT&T admits that it is a common carrier with respect to the provision of certain, but not all, services and that certain of AT&T's offerings are subject to FCC jurisdiction. To the extent the allegations in paragraph 11 state conclusions of law, AT&T denies the allegations and further responds that all conclusions of law are for the Court to reach. AT&T denies all remaining allegations in paragraph 11 of the Complaint.

12. On information and belief, AT&T admits that Plaintiffs are competitive local exchange carriers ("CLECs") that provide local and long distance telephone services in their territory. AT&T denies the remaining allegations in paragraph 12 of the Complaint.

13. AT&T admits that it is and has been a provider of long-distance telephone service. AT&T admits that it is and has been an IXC. AT&T admits that for many customers it provides and has provided a service that enables a customer in one locality to make a telephone call to another person in a distant location. AT&T admits that it provides and has provided an interexchange service to certain customers. AT&T admits that interexchange service generally includes long-distance service that involves connecting a calling party in one local service area, or telephone exchange area, with a called party in another local telephone exchange area. AT&T denies all remaining allegations in paragraph 13 of the Complaint.

14. AT&T admits that affiliates of AT&T, but not AT&T Corp. itself, provide local telephone service in some areas and that in some areas affiliates of AT&T are classified as

incumbent local exchange carriers ("ILECs"). To the extent the allegations in paragraph 14 of the Complaint purport to characterize Plaintiffs' Complaint, AT&T respectfully refers the Court to the Complaint for an accurate and complete statement of its contents, and AT&T denies all inconsistent allegations. AT&T denies all remaining allegations in paragraph 14 of the Complaint.

15. AT&T admits its long-distance network does not extend to all end-user customers' homes or businesses. AT&T admits that local exchange carriers can have facilities that connect to end users' homes or businesses. AT&T lacks knowledge and information sufficient to form a belief as to the allegations about Plaintiffs' and other local exchange carriers' networks and services, and therefore AT&T denies all such allegations. To the extent the allegations in paragraph 15 of the Complaint state conclusions of law, AT&T denies the allegations and further responds that all conclusions of law are for the Court to reach. AT&T denies all remaining allegations in paragraph 15 of the Complaint.

16. To the extent the allegations in paragraph 16 of the Complaint state conclusions of law, AT&T denies the allegations and further responds that all conclusions of law are for the Court to reach. AT&T denies all remaining allegations in paragraph 16 of the Complaint.

17. To the extent the allegations in paragraph 17 of the Complaint purport to characterize rules, regulations and orders of the FCC, AT&T respectfully refers the Court to such rules, regulations and orders of the FCC for an accurate and complete statement of their content, and AT&T denies all inconsistent allegations. To the extent the allegations in paragraph 17 state conclusions of law, AT&T denies the allegations and further responds that all conclusions of law